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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STATE BANK OF ST. CHARLES, as Administrator of
the Estate of CHRISTOPHER A. WARD, Deceased,
Petitioner,

vs.

DAVID CAMIC, PATRICK AHLGREN, DONALD STINSON,
DAN PETERSON, and THE CITY OF AURORA,
Respondents.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the petition for Writ of Certiorari fall within the category of important and special reasons specified as considerations in Supreme Court Rule 17?
2. Whether the Aurora policemen violated Christopher Ward's constitutional rights when they placed him in a cell, temporarily delaying the opportunity to make a telephone call, due to his intoxication and unruliness?
3. Whether the Aurora policemen acted with deliberate indifference to the serious medical needs of Christopher Ward, thereby violating his 8th Amendment rights?
4. Whether sufficient facts were presented to the District Court to establish that Christopher Ward's due process rights were violated by the Aurora Police Department?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, DAVID CAMIC, PATRICK AHLGREN, DONALD STINSON, DAN PETERSON, and THE CITY OF AURORA, respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be denied.

OPINIONS BELOW

The opinion of the Seventh Circuit appears in the Appendix of the Petition for Writ of Certiorari and is reported at 712 F. 2d 1140 (7th Cir. 1983). The decision of the District Court is an unpublished opinion, No. 79 C 2714 (N.D. Ill. Oct. 1, 1982) which also appears in the Appendix of the Petition for Writ of Certiorari.

JURISDICTION

The petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C.A. 1254(1). Respondent denies that this Court's jurisdiction has been properly invoked.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Const. Amend. V:

"No person shall be . . . deprived of life, liberty, or property, without due process of law."

U.S. Const. Amend. VI:

"In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

U.S. Const. Amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U.S. Const. Amend. XIV, Sec. 1:

"Section 1 . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law."

45 U.S.C.A. Section 1983:

"Civil actions for deprivation of rights

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or im-

munities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress."

Supreme Court Rule 17.1(a):

"When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Supreme Court Rule 17.1(c):

"When a federal court of appeals . . . has decided a federal question in a way in conflict with applicable decisions of this court."

Illinois Revised Statutes, ch. 38, par. 103-3(a):

"Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls . . . such communication shall be permitted within a reasonable time after arrival at the first place of custody."

Illinois Revised Statutes, ch. 70, par. 1:

"Whenever the death of a person shall be caused by wrongful act, neglect or default . . . shall be liable to an action for damages . . ."

STATEMENT OF THE CASE

The respondents adopt the statement of the case as presented by the United States Court of Appeals for the Seventh Circuit in its opinion below, which appears in the Appendix to the Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI DOES NOT FALL WITHIN ANY OF THE IMPORTANT AND SPECIAL REASONS SPECIFIED IN SUPREME COURT RULE 17.

Rule 17 of this Court lists considerations which govern review of certiorari. Section 1(a) of Rule 17 is concerned with the situation where the decision in question conflicts with decisions on the same matter from other circuits or state courts of last resort. Petitioner has failed to allege in its petition that the decision of the Seventh Circuit in any way conflicts with a decision on point with the present case. The conclusion is obvious, petitioner—being unsatisfied with the District Court and Seventh Circuit decisions—is attempting to have this Court review the evidence and reach a different result. It is firmly established that the Supreme Court will not grant a Writ of Certiorari merely to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938).

Apparently petitioner relies upon Section 1(c) of Rule 17 for its argument that this Court should grant the Writ of Certiorari. Presumably petitioner contends that the Seventh Circuit's decision conflicts with the applicable decisions of this Court. Petitioner's contentions are based upon misinterpretations of the law. A close examination of petitioner's argument establishes that the essence of its argument is that the District Court and the Seventh Circuit wrongly reviewed the facts when they found the alleged deprivations did not meet constitutionally pro-

tected levels. Clearly, such an argument is not a proper basis upon which this Court will grant a Writ of Certiorari.

II.

CHRISTOPHER WARD'S SIXTH AMENDMENT RIGHTS WERE NOT VIOLATED WHEN HE WAS TEMPORARILY DELAYED THE OPPORTUNITY TO MAKE A TELEPHONE CALL.

The alleged Sixth Amendment violation took place while the police officers were merely attempting to elicit booking information from Ward. In the record there is no mention of a request for counsel—merely for a telephone call. In fact, when the police officers asked Ward who his attorney was, he refused to respond. Ill. Rev. Stat., ch. 38, sec. 103-3 provides that persons who have been arrested shall have a right to make a telephone call within a reasonable time. One can calculate that Christopher Ward died less than one hour after he arrived at the police station. (Appendix pp. vii & ix.) In light of the fact that Christopher Ward was highly intoxicated, a one hour delay certainly cannot be considered an unreasonable period of time to withhold permission to make a telephone call. Allowing a phone call to a highly intoxicated person, such as Ward, would have served no useful purpose.

Furthermore, there is no evidence of police interrogation. The booking process is a routine procedure. The only information obtained through the process is biographical data. In *Kirby v. Illinois*, 406 U.S. 682 (1972), this court stated:

... an accused is entitled to counsel at any critical stage of the prosecution . . . *Id.* at 690.

Petitioner's argument is that the booking process is a "critical stage" in the prosecution is utterly without merit.

It is important to note that the Seventh Circuit did not hold that Ward was never entitled to make a telephone call. The court merely held that:

"Ward had no Sixth Amendment right to a phone call absent any effort to interrogate him or any action by the Aurora Police Department subject to characterization as the initiation of adversary judicial proceedings." (Appendix p. xviii.)

Unquestionably, Christopher Ward was highly intoxicated and uncooperative. The Seventh Circuit stated in its opinion below:

... Ward was *obviously intoxicated* . . . (Appendix p. vi) (Emphasis added).

The court further noted:

Under *Kirby*, Ward's right to counsel was not violated by postponing his right to a phone call until completion of the booking form bearing in mind his *intoxicated condition*. (Appendix pp. xvi-xvii.) (Emphasis added).

Petitioner apparently contends that respondent's failure to immediately grant telephone call privileges to an intoxicated and uncooperative person rises to the level of a constitutional deprivation of counsel. Obviously petitioner has misinterpreted this court's decisions in *Escobedo v. Illinois*, 378 U.S. 478 (1964) and *Kirby v. Illinois*, 406 U.S. 682 (1972). Under the law and the facts of this case, petitioner is unable to establish that Ward's Sixth Amendment right to counsel was violated by the defendants.

III.

THE EVIDENCE FAILS TO ESTABLISH THAT THE AURORA POLICEMEN ACTED WITH DELIBERATE INDIFFERENCE TO THE SERIOUS MEDICAL NEEDS OF CHRISTOPHER WARD IN VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS.

A close examination of the facts in this case establishes that both the District Court and the Seventh Circuit correctly granted summary judgment in favor of the respondents on this issue. Ward arrived at the police station sometime between 6:30 P.M. and 6:45 P.M. He was placed in a cell at approximately 6:55 P.M. (Appendix p. viii). As part of the normal procedure, the police officers took his property, including his belt and shoe laces. When Christopher Ward was found at 7:47 P.M., he had been dead for approximately 30 minutes (Appendix p. ix). Conservatively, one can estimate that Ward committed that fatal act within half an hour of being left unattended.

In *Estelle v. Gamble*, 429 U.S. 97 (1976), this court held that:

Only deliberate indifference to the serious medical means of prisoners constitutes the unnecessary and wanton infliction of pain. . . prescribed by the Eighth Amendment. *Id.* at 104.

As the Seventh Circuit noted, "even though Section 1983 embodies no state of mind requirement, *Parratt v. Taylor* (citation omitted), the 8th Amendment does." (Appendix p. xxiii). Furthermore, The Seventh Circuit noted that, the police had no reason to suspect that Ward might commit suicide. (Appendix p. xxv.) As a matter of fact, his parents admit that they had no idea that he might take his own life. Christopher Ward was never under any psychiatric care during his lifetime. As the District Judge noted in his opinion, the only way the officers could have

insured that there would be no suicide would have been to have one of the policemen physically remain in the cell with Ward (Appendix p. xlix). Obviously, there was no constitutional obligation on the defendants to do any such thing.

Because of the short time-frame involved in conjunction with the intoxication and attitude of Christopher Ward, the District Court and Seventh Circuit properly found that the standards set down in *Estelle* could not be met by petitioner. Clearly the evidence establishes that the police officers did not act with deliberate indifference to the medical needs of Christopher Ward.

IV.

INSUFFICIENT EVIDENCE WAS PRESENTED TO THE DISTRICT COURT TO ESTABLISH THAT CHRISTOPHER WARD'S DUE PROCESS RIGHTS WERE VIOLATED BY THE AURORA POLICE DEPARTMENT.

It is the clear and unequivocal policy of this Court that it will not decide issues raised for the first time in a petition for Writ of Certiorari. This policy was affirmed in the case of *Tacon v. Arizona*, 410 U.S. 351 (1973). In this case, the primary legal issues concerned a state's power to try a criminal defendant in absentia. In dismissing the Writ of Certiorari as improvidently granted, this Court stated:

Upon reviewing the record, however, it appears that these broad questions were not raised by the petitioner below nor passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time here. *Id.* at 352.

Accordingly, respondent contends that there is no issue before this Court concerning a negligent deprivation of Christopher Ward's civil rights.

Although petitioner did not raise the issue of the alleged negligence of the Aurora Police Department as forming a basis for a violation of Ward's civil rights, the Seventh Circuit addressed that claim during oral argument and in their decision. In the event this Court deems it proper to hear an argument on said issue, respondent addresses that argument at this time.

Parratt v. Taylor, 451 U.S. 527 (1981) is particularly relevant to the analysis if such a claim is considered because its decision was based upon the broad language of the due process clause. In *Parratt*, a prison inmate lost a mail order hobby kit. He filed a civil rights action against the prison officials on the ground that the prison officials negligently lost his property and he was deprived of due process in violation of the Fourteenth Amendment. This court held that misplacing the hobby materials fell within the literal language of the Fourteenth Amendment. *Id.* at 536. However, the majority of this court also found that depriving one of his property is not a violation of the Fourteenth Amendment as long as the victim has recourse to "due process of law." *Id.* at 537.

The type of conduct at issue on the present case does not form a basis for a Section 1983 action. As stated in *Parratt*:

"To accept respondent's argument that the conduct of state officials in this case constitute a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by state officials acting under 'color of law' into a violation of the Fourteenth Amendment cognizable under Section 1983 . . . Such reasoning 'would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states' . . . We do not think that the drafters of the Four-

teenth Amendment intended the Amendment to place such a role in our society." *Id.* at 544.

Since *Parratt*, case law overwhelmingly supports respondents' argument that the scope of a Section 1983 action should not be expanded to include every alleged negligent act by a government official. *Johnson v. Miller*, 680 F. 2d 39 (7th Cir. 1982); *Massey v. Smith*, 555 F. Supp. 743 (N.D. Ind. 1983); *Eberle v. Baumfalk*, 524 F. Supp. 515 (N.D. Ill. E.D. 1981); *Hull v. City of Duncanville*, 678 F.2d 582 (5th Cir. 1982); *Mills v. Smith*, 656 F. 2d 337 (8th Cir. 1981).

Under Illinois law, petitioner may have recourse to a state tort remedy—a wrongful death action. (Ill. Rev. Stat., ch. 70, par. 1 et seq. *Dezort v. Village of Hinsdale* (1976), 35 Ill. App. 3d 703). As the Seventh Circuit stated in its opinion below:

Even if the existence of a state tort remedy applicable to the Bank's grievance does not automatically preclude the existence of a constitutional deprivation in this case under *Parratt*, the allegations made by the Bank simply do not support the conclusion that Ward was deprived of any Fifth or Fourteenth Amendment due process rights. (Appendix p. xxxii)

Respondent contends that the issue of the existence of a civil rights claim based upon negligence is not properly before this court. Furthermore, even if said issue is to be considered at this time, the Seventh Circuit correctly resolved the issue when it held that Ward's due process rights were not violated.

CONCLUSION

The petition for writ of certiorari fails to address an issue of such importance as to warrant this Court's attention.

There is no federal question properly before this Court for review. Petitioner is merely attempting to have this Court weigh the evidence concerning the alleged deprivation of Christopher Ward's Fifth, Sixth, Eighth and Fourteenth Amendment rights. Both the District Court and the Seventh Circuit properly determined that summary judgment should be entered for the respondents in this case.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: November 1, 1983

Respectfully submitted,

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